No. 42209-3-II

COURT OF APPEALS DIVISION II
OF THE STATE OF WASHINGTON

SUPERIOR COURT OF WASHINGTON FOR KITSAP COUNTY

SHEILA VERHALEN, Respondent,

v.

TRAVIS WRIGHT, Appellant.

BRIEF OF APPELLANT

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I. INTRODUCTION

This case presents the questions of whether, in a dispute about parenting time in a parentage case, a represented parent's rights were violated when:

A. (through counsel) the parent files a motion for writ of habeas corpus (for return of a child) and (1) schedules a hearing on less than 3 ½ hours notice (by telephone) and (b) does not give a copy of either the motion or the proffered orders to opposing counsel until *after* the Court has signed the orders,

and

B. the trial court denies the non-moving parent's counsel's reasonable request for continuance and hears argument from only the moving party's attorney.

II. ASSIGNMENTS OF ERROR

The trial court erred in

A. hearing the case on less than 3 ½ hours notice (by the movant) to opposing counsel;

B. hearing the case when it knew that the non-moving party was represented by counsel and that opposing counsel (a) could not feasibly be present for the hearing and (b) had requested a continuance;

C. entering orders when the moving party had not served a copy of either (a) its motion for the orders or (b) the proposed orders to opposing counsel until *after* the Court had signed the orders.

D. imposing attorney fees on the non-moving party.

III. STATEMENT OF THE CASE

This is a parentage case. Following a trial (on Mother's notice of relocation under the Parental Relocation Act (RCW 26.09.405 et seq)) in November 2007, the Court had entered a final parenting plan. Mother (who lives in Georgia) was designated as the primary residential parent; Father (who lives in Washington) had reasonable parenting time. Parenting Plan Final Order of 11-16-09. It has not been modified since then.

Section 3.11 of the parenting plan provides that "The receiving parent (or designee) shall accompany the child as required by airline. The parents may designate a responsible adult to accompany the child during travel as required by airline regulations. The parents shall give advance notice of any person designated to participate in travel." (emphasis supplied).

Section 3.11 further requires that "The parties shall cooperate in the facilitation of the child's travel." and "The parents shall cooperate with each other regarding the flight schedule."

The child had been with Father for spring break, from 3-26-11 and was due in normal course to return to Mother on 4-5-11. The parties have always interpreted this section of the parenting plan to mean that their daughter, MW (Maddie), would fly accompanied by a responsible adult. MW had never flown unaccompanied since the parenting plan was entered until her flight back to Georgia on April 5, 2011. Declaration of Travis Wright of 4-14-11 at 2: 1-15; 5-3-11 Declaration of Sheila Verhalen [Mother] in Response to Motion for Reconsideration at 2: 10-11; 4-14-11 declaration of Cindy Wright at 2: 1-7.

The child was to return on 4-5-11. School was to resume (following spring break) in Georgia on 4-6-11. 5-3-11 Declaration of Sheila Verhalen at 4: 5.

Mother, while at first agreeing with Father that the child would be *accompanied*, as in the past, by a responsible adult, later informed Father that the child (a ten year old girl) would be flying unaccompanied. Declaration of Travis Wright of 4-14-11 at 2: 1 - 4: 4; 4-14-11 Declaration of Cindy Wright at 2: 21 - 3: 9;

Declaration of John Wright of 4-14-11 at 2: 1 - 3: 14; 4-14-11 Declaration of Tiffany Simmons at 2: 1 - 3: 19.

The parties were clearly in disagreement about what the how the parenting plan applied regarding the requirements for the child's return trip to Georgia. Decl. of Travis Wright (attached to Father's 4-4-11 Request to Reschedule Petitioner's Request for Writ of Habeas Corpus); Decls. of Travis Wright, John Wright, Cindy Wright, Tiffany Simmons of 4-14-11; Decl. of Sheila Verhalen of 5-4-11; Verbatim Report of Proceedings of 4-4-11 at 3: 5-8.

At 10:13 a.m. on 4-4-11 the Legal Assistant for Mr. Boldt (Father's attorney) received a call from Mother's attorney informing them that she would be going to court *that afternoon* at 1:30 p.m. to obtain a Writ of Habeas Corpus ordering the return of the child to mother.

Mr. Boldt's Legal Assistant (Amy Rau) told Mother's lawyer that Mr. Boldt was not in the office yet but had two previously scheduled hearings in Mason County Superior Court that day at 1:30 p.m. (*DSHS and James*, Mason County Superior Court case #11-3-00016-5, and *Rybalchenko and Perrott*, Mason County Superior Court case #11-3-00047-5). These had both been scheduled weeks before and were priority settings (within 30 days)

for motions for revision under Mason County Superior Court LR 59-1 and 2.

Ms. Adams (Mother's attorney) said she would inform the judge that Mr. Boldt was unavailable and said they would like to settle the matter without going to court.

Ms. Rau asked Mother's attorney (Ms. Adams) if she could e-mail to Mr. Boldt's office a copy of the motion she was going to file. She said she was still working on it but would send it to us as soon as it was ready. Declaration of Amy Rau of 4-14-11 at 2: 1-18.

Ms. Rau hastily arranged a meeting with Father (Travis Wright) for as soon as possible---at 11:30 a.m. that day. Decl. of Amy Rau of 4-14-11 at 3: 2 - 10.

At 1:04 p.m. that day (4-4-11) Father's attorney (James Boldt) filed a Request to Reschedule Petitioner's Request for Writ of Habeas Corpus (with attached declaration of Father). This request summarized the above-noted 'notice' received from Mother's attorney, as well as the impossibility of Father's Attorney (whose office is in Shelton, Washington) being at the Kitsap County Courthouse at the same time he had to be a two previously set hearings entitled to priority setting in Mason County. This 1:04 p.m.

filing was simultaneously sent via fax to Mother's attorney. She personally handed it to the Trial Judge (Verbatim Report of Proceedings of 4-4-11 at 2: 9-13 and 20-23).

The Trial Judge denied Father's request for continuance. Verbatim Report of Proceedings of 4-4-11 at 4: 22-23.

By 1:40 p.m. the 1:30 p.m. 'hearing' was over. Declaration of Amy Rau of 4-14-11 at 3: 18-22; Decl. of John Wright at 3: 21-24; Decl. of Cindy Wright of 4-14-11 at 3: 22 - 4: 1; Decl. of Travis Wright of 4-14-11 at 4: 22 - 5: 5.

The Writ of Habeas Corpus was signed at that hearing. At the time the Trial Judge had signed the Writ, he had heard from Mother's Attorney and (in an apparently unsworn statement) from Mother's father in law (Mr. Looney) ---but no one else. Verbatim Report of Proceedings of 4-4-11 at 1: 1 - 6: 14.

After a recess, at a 3:30 p.m. court session, the Trial Judge said he signed the Order to Issue Writ. Verbatim Report of Proceedings of 4-4-11 at 6: 16 - 8: 20.

The record is not clear whether the Trial Court signed the Warrant in Aid of Writ of Habeas Corpus at the 1:30 p.m. session or the 3:30 p.m. session (although it appears more likely it was the 1:30 p.m. session from this colloquy:

> "[Ms. Adams] . . . there will be a second hearing, because once the child is obtained by law enforcement we will have a hearing where the -- I guess concerns will be addressed.
>
> THE COURT: will that be on 3:30 ex parte?
>
> MS. ADAMS: If they can get the child by that time. I'm going to go to the clerk's office and get my certified copy and on to law enforcement. I've contacted the Kitsap's Sheriff's Office today and advised them this is coming down." Verbatim Report of Proceedings of 4-4-11 at 5: 6-16).

It also appears that the Trial Judge misspoke himself in saying that he signed the Order for the Writ at the 3:30 p.m. session, since (a) the Order for the Writ would logically precede the writ and (b) Father's office had received all the documents at 2:22 p.m. that day. Decl. of Amy Rau at 4: 11-12.

Father's counsel did not get out of the two pre-scheduled hearings in Mason County that he had advised the Court of until about 4:30 p.m. that day. That was the first time he saw Mother's Motion or any of the three orders the Court had signed. Declaration of Amy Rau of 4-14-11 at 4: 21-22. Father's counsel was thus not present at any of the hearings on Mother's Motion for Writ and related orders.

On 4-14-11, Father (through counsel) filed a Motion to Reconsider Issuance of Order for Writ of Habeas Corpus, Writ of Habeas Corpus, Warrant in Aid of Writ of Habeas Corpus, and

Related Documents (with supporting declarations of Father, Cindy Wright, John Wright, Tiffany Simmons, and Amy Rau).

> Kitsap County LCR 59(e) provides that
> "(e) Hearing on Motion for Reconsideration. A motion for reconsideration shall be submitted on briefs and affidavits of the moving party only. No response shall be submitted by the opposing party, nor shall oral argument be heard, unless the Court so directs. The Court shall notify the parties, not later than 10 days before the hearing, whether: (1) the motion has been denied and the hearing stricken; or (2) oral argument and/or responsive pleadings will be allowed."

Utilizing that rule, the Trial Judge on 4-22-11 issued an Order for Responsive Briefing on Petitioner's Motion for Reconsideration---and ruled that "Oral argument, however, shall not be permitted." Indeed, the Trial Judge struck the hearing which had been set (on 4-14-11 by Father's attorney, for 5-6-11).

Mother (through counsel) filed a Memorandum in Response to Motion for Reconsideration (along with Mother's Declaration) and Declaration of Attorney Fees on 5-4-11. Also on that date, Father filed a Declaration of Attorney Fees.

On 5-13-11 the Trial Court issued an Order on Respondent's Motion for Reconsideration. This order denied (a) Father's Motion for Reconsideration and (b) Mother's request for attorney fees.

IV. ARGUMENT

A. Parent Has a Constitutionally Protected Liberty Interest in His or Her Children

In *Troxel v. Granville*, 530 US 57, 120 S Ct 2054, 147 LE2d 49 (2000) the United State Supreme Court (ruling in favor of parental rights over a Washington statute that provided for grandparent visitation), held that a parent has a 14th Amendment Due Process liberty interest---procedural and substantive---in his or her minor children. 530 US 65-66

Several other cases have recognized this principle (in widely varying contexts). One example of many is

In *State v. Ancira*, 107 Wash App 650, 27 P.3d 1246 (Div 1, 2001), the Court reversed a trial court order precluding a criminal defendant from visiting his children after conviction of violating a no-contact order. The Court held that:

> "Parents have a fundamental liberty interest in the care, custody, and control of their children.3 Prevention of harm to children is a compelling state interest,4 and the State does have an obligation to intervene and protect a child when a parent's "actions or decisions seriously conflict with the physical or mental health of the child."5 But limitations on fundamental rights are constitutional only if they are "reasonably necessary to accomplish the essential needs of the state."6 The fundamental right to parent can be restricted by a condition of a criminal sentence if the condition is reasonably necessary to prevent harm to the children.7

> Therefore, we must determine whether the record supports the proposition that prohibiting Ancira from all contact with his children is reasonably necessary to protect them from the harm of witnessing domestic violence.
> 3Santosky v. Kramer, 455 U.S. 745, 753, 102 S.Ct. 1388, 71 L.Ed.2d 599 (1982)
> 4In re Dependency of C.B.,79 Wash.App. 686, 690, 904 P.2d 1171 (1995).
> 5In re Sumey, 94 Wash.2d 757, 762, 621 P.2d 108 (1980).
> 6State v. Riles, 135 Wash.2d 326, 350, 957 P.2d 655 (1998).
> 7State v. Letourneau, 100 Wash.App. 424, 439, 997 P.2d 436 (2000).
> We conclude that the State has failed to demonstrate that this severe condition was reasonably necessary to prevent the children from witnessing domestic violence. There can be no doubt that witnessing domestic violence is harmful to children. And there is ample evidence in the record that Ancira has not been an exemplary parent. But, contrary to the State's view, these broad assertions, standing alone, do not form a sufficient basis for this extreme degree of interference with fundamental parental rights." 107 Wash App 653-654, 27 P3d 1247-1248 (emphasis supplied).

Also applicable is Washington Constitution, Art. I, Sec. 3's Guarantee of Due Process of Law.

B. <u>Due Process Violation: Inadequate Notice</u>

The above-noted constitutionally protected liberty interest of a parent in his (or her) child means (among other things) that the parent is entitled to Due Process of Law in judicial decisions affecting his children.

In *Marriage of Ebbighausen*, 42 Wash App 99, 102, 708 P.2d 1220, 1222 (Div 3, 1985), the Court held (in a child custody case) that

> " A careful review of the record, examination of the pleadings and the court's oral opinion convinces this court the father's constitutional rights of due process, as guaranteed under the fourteenth amendment to the United States Constitution, and Article 1, section 3 of the Washington Constitution, have been violated.
>
> Article 1, section 3 of the Washington Constitution provides that no person shall be deprived of life, liberty or property without due process of law. Procedural elements of this constitutional guarantee are notice and the opportunity to be heard and defend before a competent tribunal in an orderly proceeding adapted to the nature of the case. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950); Wenatchee Reclamation Dist. v. Mustell, 102 Wash.2d 721, 725, 684 P.2d 1275 (1984). Judgments entered in a proceeding failing to comply with the procedural due process requirements are void. [cases cited] . . . (emphasis supplied)

The U.S. Supreme Court in ----- formulated the basic requirements of Due Process this way in *Bodie v. Connecticut*, 401 US 371, 377, 91 S.Ct. 780, 28 Led2d 113 (1971) (finding court filing fees unconstitutional as to indigent litigants in divorce cases):

> "Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard. (emphasis added).

The adequate notice requirement was explained by the Court in *Pritchard v. Pritchard*, 103 Conn App 276, 287, 928 A2d 566, 573-574 (2007) (an enforcement of child support case), when it found the notice to one party insufficient:

> "At the outset, we note the principles underlying the necessity for adequate and proper notice. 'It is the settled rule of this jurisdiction, if indeed it may not be safely called an established principle of general jurisprudence, that no court will proceed to the adjudication of a matter involving conflicting rights and interests, until all persons directly concerned in the event have been actually or constructively notified of the pendency of the proceeding, and given reasonable opportunity to appear and be heard.... It is a fundamental premise of due process that a court cannot adjudicate a matter until the persons directly concerned have been notified of its pendency and have been given a reasonable opportunity to be heard in sufficient time to prepare their positions on the issues involved." (Citation omitted; internal quotation marks omitted.) *Egan v. Egan,* 83 Conn.App. 514, 518, 850 A.2d 251 (2004)."

In this case, Mr. Wright (Father) did not have adequate notice, a "meaningful opportunity to be heard," and "reasonable opportunity to be heard in sufficient time to prepare" his "positions on the issues involved." He did not have these constitutionally required elements of Due Process because there was no "meaningful" notice.

The 'notice' was a phone call from Mother's lawyer.

The 'notice' was less than 3 and half hours from the hearing.

The hearing was to decide on 27 pages of documents Mother's counsel supplied to the Court---but *not* to Father or his attorney (until after the hearing). Thus, in terms of what, specifically (not just a reference to a habeas corpus motion for a child's flight to Georgia) Mother was asking---the documents---and proposing (the three proposed orders) there was no notice at all. They were shown to the Court but not to Father's counsel. That is the antithesis of adequate notice.

There was no semblance of any 'emergency' that would have justified the motion that was, in essence (though perhaps not technically) an *ex parte* proceeding (the court gets a copy of the motion before the hearing but not opposing counsel) not justified by any law or circumstance.

Regarding ex parte motions, the authors of Washington Handbook on Civil Procedure, 2010-2011 Ed. (Tegland and Ende, West Publishing, 2010) emphasize in sec. 64.2 that:

> "Unless there is an unambiguous statute or rule authorizing the particular motion to be made ex parte, an order obtained without notice will be vacated upon 'any showing of prejudice'. Soper v. Knaflich, 26 Wash. App. 678, 613 P.2d 1209 (Div. 1 1980); see also City of Seattle v. Sage, 11 Wash. App. 481, 523 P.2d 942 (Div. 1 1974) (effect of failure to comply with the notice requirement of CR 54(f) is to void entry of judgment or order and make action of the trial court ineffectual)."

There are signs that the legal profession in Washington is beginning to understand the constitutional problems of the overuse of ex parte orders. See, for example, Virginia Leen's "Due Process Requires Ex Parte Notice, Even in Family Law Matters." Washington State Bar News, September 2010 at 21.

The claims of Mother could not be answered (either by declarations or by preparation with Father's attorney, for testimony if that were allowed) in the ridiculously short time between the 'notice' and the hearing.

It was, obviously, completely infeasible to present Father's factual and legal positions in the time allotted to Father's counsel.

These insurmountable barriers, placed by Mother's attorney and allowed by the Court were despite the facts that (a) Mother's counsel knew that Father had an attorney, (b) the Court knew that Father had an attorney, and (c) Father's attorney (1) had an office at least an hour away from the courthouse, and (2) filed written request for at least a continuance.

Father in short had factual and legal defenses that, as a practical matter, he was unable to assert because of the utter lack of any meaningful notice or time to prepare. Father's Due Process

rights, summarized above, were not recognized and given effect; they were ignored and denied.

Unfortunately the appearance (though presumably not the trial judge's intent) was that the Court simply rubber-stamped the Mother's assertions and her lawyer's requests. Father, the public, and the judicial system deserve much more than that.

C. Due Process Violation: Precluding Father's Right to Counsel

Obviously Father had (and has) a right to have an attorney represent him. He had availed himself of that right through his attorney of record; the attorney had not withdrawn. Indeed both Mother's attorney and the Court were made specifically aware that Father had an attorney.

For example, motions must be served on the attorney for a represented party. CR 5(b)(1): "Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party himself is ordered by the court."

Furthermore, not only did Father have a right to have an attorney represent him, and in fact have an attorney, but that right is also of Constitutional stature.

The Court in *Swope v. Bratton*, 541 F Supp 99, 109 (WD Arkansas, El Dorado Division 1982) delineated this (in a discharged police officer's civil suit) in holding that

> "The right to retained counsel in a civil matter is implicit in the concept of Fifth Amendment due process. Powell v. Alabama, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932). "... an analogy can be drawn between the criminal and civil litigants' respective rights to counsel. In both cases the litigant usually lacks the skill and knowledge to adequately prepare his case, and he requires the guiding hand of counsel at every step in the proceedings against him." Potashnick v. Port City Construction Co., 609 F.2d 1101, 1118 (5th Cir. 1980) (emphasis supplied)."

The United States Supreme Court alluded to this principle (in the context of the required notice and hearing to terminate welfare benefits) in *Goldberg v. Kelly*, 397 U.S. 254, 270-271, 90 S Ct 1011, 1022, 25 L.Ed.2d 287 (1970) teaching that :

> "'The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.' Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932). We do not say that counsel must be provided at the pre-termination hearing, but only that the recipient must be allowed to retain an attorney if he so desires. Counsel can help delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient."

The Court in *Texas Catastrophe Property Insurance Association, et al v. Morales*, 975 F2d 1178, 1180-1181 (5 Cir, 1992)

held in the same way: " . . . there is a constitutionally guaranteed right to retain hired counsel in civil matters, that the right in this case is grounded in the Fourteenth Amendment due process clause," explaining that:

> "Nowhere does the Constitution specifically say that a state cannot deprive persons of counsel in civil trials,[2] but a number of cases address the question. *See, e.g., McCuin v. Texas Power & Light Co.,* 714 F.2d 1255, 1262-65 (5th Cir.1983); *Mosley v. St. Louis Sw. Ry.,* 634 F.2d 942, 945-46 (5th Cir. Unit A Jan. 1981), *cert. denied,* 452 U.S. 906, 101 S.Ct. 3032, 69 L.Ed.2d 407 (1981); *Potashnick v. Port City Constr. Co.,* 609 F.2d 1101, 1117 (5th Cir.), *cert. denied,* 449 U.S. 820, 101 S.Ct. 78, 66 L.Ed.2d 22 (1980); *accord Gray v. New England Tel. & Tel. Co.,* 792 F.2d 251, 257 (1st Cir.1986). This Court has construed Supreme Court precedent to find "a constitutional right to retain hired counsel." *Id.* at 1118 (construing *Powell v. Alabama,* 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932)). *But see Kentucky W. Va. Gas Co. v. Pennsylvania Public Utility Comm'n,* 837 F.2d 600, 618 (3d Cir.)."

While the Trial Court in the case at bar did not explicitly say that Father could not have his attorney representing him at the 'hearing,' the effect was essentially the same as if the Court had so

ruled. Because of the extremely short 'notice' of the hearing and the failure to provide Father's counsel with a copy of the motion before the Court prior to the hearing, coupled with the impossibility of Father's attorney being present at that time (because of two previously scheduled hearings entitled to priority in Mason County), the Trial Court, in effect, deprived Father of having counsel representing him at the hearing.

Father notes that neither Mother's counsel nor the Trial Court ever disputed that Father had the two other pre-scheduled hearings and thus could not be present at the hurry-up hearing in the instant case.

Kitsap County Superior Court Local Rule (KCLCR) 77(k)(10)(B)(v) provides for the argument that Father's counsel would have been entitled to---if the hearing had been scheduled so that counsel for both parties were present:

> "(v) *Time Allowed for Argument*. Each side shall be limited to ten (10) minutes. Argument requiring more than twenty (20) minutes total time may be placed by the judge or court commissioner at the end of the calendar.
> If the court desires to hear further arguments after expiration of twenty (20) minutes, the matter may be placed in order at the end of the calendar for further argument or continued to a specified date."

The right to counsel is a hollow slogan, bereft of practical significance if a trial court can---as it did in this case---hold a hearing on extremely abbreviated notice that it and opposing counsel know makes it infeasible for the other party's counsel to be there representing him. That was the effect of the Trial Court denying Father's request for continuance.

D. Due Process Violation: Fairness In Judicial Proceeding

The Washington Code of Judicial Conduct (CJC) provides, inter alia, that:

> CANON 1. A JUDGE SHALL UPHOLD AND PROMOTE THE INDEPENDENCE, INTEGRITY, AND IMPARTIALITY OF THE JUDICIARY, AND SHALL AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY.
>
> Rule 1.1. Compliance with the Law. A judge shall comply with the law,* including the Code of Judicial Conduct.
> *COMMENT*
> Rule 1.2. Promoting Confidence in the Judiciary. A judge shall act at all times in a manner that promotes public confidence in the independence,* integrity,* and impartiality* of the judiciary, and shall avoid impropriety and the appearance of impropriety.*
> *COMMENT*
> *[1] Public confidence in the judiciary is eroded by improper conduct. This principle applies to both the professional and personal conduct of a judge.*
> *[2] A judge should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens, and must accept the restrictions imposed by the Code.*

> *[3] Conduct that compromises the independence, integrity, and impartiality of a judge undermines public confidence in the judiciary."* (emphasis added).

While Father does not impute any ill-motives to the Trial Judge, a 'hearing' that (a) gives the defending party less than 3.5 hours notice---and that only by a telephone call, (b) goes forward with the lawyer for only one side present (when the defending attorney has requested a continuance for indisputably good reasons), and (c) renders a decision on a motion that was never even given to the defending party's attorney---but was given to the judge---is not, and cannot be, impartial (for the judge has only heard argument from one side) and tends to undermine public confidence in the decision and in the judiciary.

Due Process requires a fairness that was not present in the way this hearing was conducted.

E. DECISION VIOLATED KITSAP COUNTY LOCAL COURT RULES

1. Kitsap County Superior Court Local Rule (KCLCR) 77(k)(10) (B)(ii)) requires that

> "Noting of Calendar Matters. Notes for motion calendars shall be filed in the Clerk's Office by 4:30 p.m. on the fifth judicial day preceding the calendar on which hearing is requested and should be substantially in the form found in Exhibit D." (emphasis added)

(a) The hearing on Petitioner's motion for writ of habeas corpus violated that rule. First, the fifth judicial day after noting the April 4, 2011 motion would have been April 11, 2011---not April 4, 2011 (the same day as the motion was filed).

(b) Second, the motion was not noted in accordance with Exhibit D; indeed it was not noted at all.

2. KCLCR 77(k) sets forth times for hearing motions. KCLCR 77(k)(2) specifies:

> "Civil Matters. Probate, guardianship and civil motions in cases which are not preassigned to a specific judge will be heard on Friday's beginning at 9:00 a.m. Civil matters in cases which have been preassigned shall be heard on that judge's departmental calendar on Fridays at 1:30 p.m."

The 'hearing' in this case was not heard on a Friday but rather a Monday.

3. If the motion for writ were considered a temporary family law matter, then KCLCR 77(k)(5)(E) applies:

> "Temporary Relief. Show cause hearings and motions for temporary relief will be heard on Friday's beginning at 9:00 a.m. [See KCLSPR 94.04(a)(2).]"---a Friday hearing. This hearing was held on a Monday.
>
> KCLCR 94.04(a)(2)(A) provides for responses to temporary motions in family law cases:
>
> "(2) Temporary Orders. The following shall apply to all contested hearings in which temporary relief is sought:

(A) Responsive Affidavits. Responsive affidavits shall be served and filed no later than 12:00 noon the day before the hearing."

That of course was impossible since 12:00 noon the day before the hearing would have been Sunday (April 3, 2011)---and there would have been an additional problem: Respondent's counsel would have had to 'respond' to something that (1) had not been filed and (2) he had not even heard of.

4. KCLCR 40(6)(C) provides for trials in domestic relations cases---applicable if the motion were to be tried:

"TRACK III - Domestic Relations.

(i) Within ninety (90) days of the case at issue, Petitioner or Respondent shall file a Note for Settlement Conference & Trial Setting - Domestic Relations (as set forth in Exhibit C).

(ii) A mandatory settlement conference shall be set within forty-five (45) days of the date noted for trial setting. Settlement conferences are mandatory and shall be confirmed before 12:00 noon the day before such conference is scheduled. [See KCLCR 16 (c)(3).]

(iii) If the case is not settled at settlement conference, the court will assign a trial date, not more than 120 days from the date of the settlement conference. Exceptions shall be addressed to the settlement conference judge.

(iv) Upon written stipulation of the parties, or upon motion of party, the court may order a change or continuance of the trial date, special set hearing, support modification hearing, or settlement conference date."

There was no compliance with this rule---applicable if the hearing were considered a trial.

5. Thus whatever the motion for habeas corpus was considered as, the timing of the hearing violated every conceivably applicable Kitsap County Superior Court Local Rule.

6. There is no exception in the KCLCR for a motion for habeas corpus.

7. Furthermore, this was not a *de minimus* violation---for example a note for motion calendar filed a few minutes after the 4:30 p.m. deadline---or five days notice but heard on a day of the week other than what the rules provided for---or a confirmation that was an hour late. The violation of the KCLCR was major: it deprived Father of any meaningful opportunity to respond (with declarations, testimony, legal memoranda, or argument by his counsel. There error was thus fundamental and clearly prejudicial.

F. DECISION VIOLATED WASHINGTON RULES OF CIVIL PROCEDURE

1. The Washington Rules of Civil Procedure bind all the superior courts in this state. CR 1 makes this clear:

> "These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

CR 81 provides that

"(a) To What Proceedings Applicable. Except where inconsistent with rules or statutes applicable to special proceedings, these rules shall govern all civil proceedings. Where statutes relating to special proceedings provide for procedure under former statutes applicable generally to civil actions, the procedure shall be governed by these rules.
(b) Conflicting Statutes and Rules. Subject to the provisions of section (a) of this rule, these rules supersede all procedural statutes and other rules that may be in conflict."

2. CR 6(d) sets forth notice requirements for motions:

"(d) For Motions--Affidavits. A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time." (emphasis supplied)

CR 6(d) is explained in the treatise 15A Wash. Prac., Handbook Civil Procedure § 61.1 (2010-2011 ed.) this way:

"A motion is made when it is served, not when it is filed. CR 6(d) establishes the general notice requirements for motions. A written motion and notice of hearing must be served on the non-moving party not later than five days before a motion hearing date, unless a different period is fixed by local rule or order of the court.

3. The Civil Rules do not provide for a motion for order to shorten time---but such is the usual way (and, if justified sufficiently)

a way consistent with CR 6(d)---to have a motion heard on less than five judicial days notice. As is noted in a leading treatise on Washington civil procedure, Tegland and Ende, 15A Wash. Prac., Handbook Civil Procedure § 61.3 (2010-2011 ed):

> "CR 6(d) permits the 5-day notice period to be changed by court order. Thus, a party may seek to have a motion heard on less than minimum notice. This is usually called a motion to shorten time."

In this case, however, Mother's counsel did not even file a motion for order to shorten time.

4. Rules such as CR 6(d) are there for a reason. As the Court noted in *Christensen v. Ellsworth*, 162 Wash 2d 365, 372, 173 P3d 228, 231-232 (2007),

> "It is a well-accepted premise that '[l]itigants and potential litigants are entitled to know that a matter as basic as time computation will be carried out in an easy, clear, and consistent manner, thereby eliminating traps for the unwary who seek to assert or defend their rights.' Stikes Woods Neighborhood Ass'n v. City of Lacey, 124 Wash.2d 459, 463, 880 P.2d 25 (1994) (alteration in original) (quoting McMillon v. Budget Plan of Va.,510 F.Supp. 17, 19 (E.D.Va.1980))."

5. Obviously the Respondent-Father was prejudiced by the violation of CR 6(d) (as well of the KCLCR requiring five judicial days notice for a motion): Petitioner-Mother filed a motion and declaration which (with attachments) consisted of 19 pages; she also proffered to the Court three documents for signature:

proposed (a) order for writ of habeas corpus, (b) writ of habeas corpus, and (c) warrant in aid of writ of habeas corpus; these three consisted of an additional eight pages.

The writ authorized---indeed ordered---law enforcement to "break and enter any outer or inner door or other opening of any building, vehicle, or other enclosure as necessary to secure the body of [the child] . . ."

This drastic measure was imposed against a litigant, in the absence of any emergency, in circumstances virtually guaranteed to insure that Mr. Wright would have no assistance of counsel:

Father's attorney first received a sort of 'notice' of the hearing zero days and 3 hours and 20 minutes before the hearing---a telephone call.

Father's attorney barely had time to even (a) superficially review the allegations of the motion and the proffered documents for the court and (b) confer with Father about the allegations in the motion before he would have had to leave to get to the hearing on time (1:30 p.m.) ---<u>if</u> he were even available to do so (which he was not) and <u>if</u> he had received a copy of the motion before the hearing (which he did not).

6. Father's attorney thus had *no* meaningful time within which to prepare sufficient responsive declarations, prepare witnesses for a hearing (if live testimony were allowed by the Court), conduct any research, or prepare any memorandum, or otherwise investigate the operative facts of this case. In these circumstances, the 'notice' was an ephemeral gesture, bereft of any meaningful opportunity for Father to respond to Mother's allegations.

The prejudice to Father resulting from the violations of CR 6(d) and KCLCR) 77(k)(10) is clear, substantial, and materially adversely affected Father's right to present (through his counsel) his position for the Court to consider.

G. Decision Not Authorized by Habeas Corpus Statutes

1. Washington habeas corpus statutes are contained in RCW 7.36. The introduction and overview is in 7.36.010, which provides that "Every person restrained of his liberty under any pretense whatever, may prosecute a writ of habeas corpus to inquire into the cause of the restraint, and shall be delivered therefrom when illegal." (emphasis added).

2. These include possible use in recovering a child "restrained of his [or her] liberty." RCW 7.36.020, which specifies that:

> "Writs of habeas corpus shall be granted in favor of parents, guardians, limited guardians where appropriate, spouses or domestic partners, and next of kin, and to enforce the rights, and for the protection of infants and incompetent or disabled persons within the meaning of RCW 11.88.010; and the proceedings shall in all cases conform to the provisions of this chapter." (emphasis supplied).

But what sort of 'inquiry' could there be by the Court when it only hears from one party's attorney, with no meaningful 'notice' to the other side (represented by counsel)?

3. The process requires a petition---analogous to a typical civil complaint---specifying what makes the restraint illegal and in what way it is unlawful. RCW 7.36.030. The next pleading is a "return," (like and answer in civil cases generally). RCW 7.36.100.

4. Other pleadings are envisioned as well. RCW 7.36.110:

> "The court or judge, if satisfied of the truth of the allegation of sickness or infirmity, may proceed to decide on the return, or the hearing may be adjourned until the party can be produced, or for other good cause. The plaintiff may except to the sufficiency of, or controvert the return or any part thereof, or allege any new matter in evidence. The new matter shall be verified, except in cases of commitment on a criminal charge. The return and pleadings may be amended without causing a delay."

5. There must be a hearing:

> "The court or judge shall thereupon proceed in a summary way to hear and determine the cause, and if no legal cause be shown for the restraint or for the continuation thereof, shall discharge the party." RCW 7.36.120.

But what kind of 'hearing' could there be when Father's attorney only 'receives' a copy of what is filed with the Court after the hearing?---'receives' meaning that it was e-mailed to Father's attorney's office when (as Father's attorney had advised Court and counsel) he was in two other pre-scheduled priority hearings

What kind of 'hearing' could there be when there was---by any rational measure---clearly insufficient time to confer prospective witnesses or declarants, research applicable law, and prepare any kind of written presentation to the Court to counter what Mother's lawyer had filed?

And what kind of 'hearing' could there be when it was about a motion (and proffered orders) that Father's attorney's office (for again Father's attorney was in other hearings at the time) did not even receive until after the so-called hearing?

The only kind of 'hearing' that there could be in such circumstances was what in fact occurred: a one-sided cursory

grant of what Mother's attorney wanted. That is not in substance a hearing at all; it is a quick and unjustified ratification of the Mother's position after hearing from only one side on the merits---when her attorney and the Court *knew* that Father had an attorney who (a) could not be there at the time Mother set and (b) has obviously insufficient time to present Father's position even if he could have been there.

While the hearing may be "in a summary way," there must be one. In *Hoy v. Rhay*, 54 Wash 2d 508, 342 P.2d 607 (1959), vac on other grounds, *McGrath v. Rhay*, 364 US 279 (1960), *the hearing was four and a half days*. The petition was filed in June of 1956. While the trial date is not given in the opinion, it was held pursuant to an 11-21-56 order to the Whatcom County Superior Court by the Washington Supreme Court. *Both petitioners were present and represented by counsel*. The court orally announced its findings and later a motion for rehearing was denied after argument.

6. No habeas corpus statute provides for anything remotely resembling the warp-speed 'notice' and 'hearing' conducted in this case on April 4, 2011---*nor has any reported case in the history of*

Washington state sanctioned such a super-abbreviated notice and 'hearing' in a habeas corpus case.

Indeed, in practical effect, there was no notice. A copy of the 'pleading'---"Motion and Declaration for Order, Warrant and Writ of Habeas Corpus" was not even given to Father or his counsel of record until *after* the hearing. A telephone call from a moving attorney is not a pleading, a petition, or a motion; it is simply that: a phone call. No habeas corpus statute authorizes that.

7. One of the documents Mother's counsel presented to the Court for signature was a "warrant in aid of writ of habeas corpus." A habeas corpus warrant is addressed in RCW 7.36.190, which provides that:

> "7.36.190. Warrant to prevent removal
> Whenever it shall appear by affidavit that any one is illegally held in custody or restraint, and that there is good reason to believe that such person will be carried out of the jurisdiction of the court or judge before whom the application is made, or will suffer some irreparable injury before compliance with the writ can be enforced, such court or judge may cause a warrant to be issued reciting the facts, and directed to the sheriff or any constable of the county, commanding him to take the person thus held in custody or restraint, and forthwith bring him before the court or judge to be dealt with according to the law." (emphasis added).

There was no good reason to believe that Father would take the child out of the jurisdiction (and even that would be rather meaningless, for wherever either parent went, the Court's jurisdiction would remain) of the court or would suffer some irreparable harm. For that reason, among many, the writ, the order for the writ, and the warrant in aid of the writ, should not have been granted.

8. Temporary orders are allowed in habeas corpus cases:

> "7.36.220. Temporary orders
> The court or judge may make any temporary orders in the cause or disposition of the party during the progress of the proceedings that justice may require. The custody of any party restrained may be changed from one person to another, by order of the court or judge."

Only one reported case has construed that statute: *State Ex Rel. Ward Et Ux.v.Superior Court Of State, In And For Pierce County*, 38 Wash 2d 431, 230 P.2d 302 (1951). The Wards were the parents of a seven year old boy. They had left him in the care of his grandparents (the Faracos---paternal grandmother and step grandfather) since the boy was four months old; the father was in the armed forces at the time.

The Faracos (alleging the parents would flee the jurisdiction) refused to release the boy back to his parents upon their request. The parents filed a petition for habeas corpus---on March 14, 1951 ---to affect the child's return.

Then

> "the writ was duly issued and the matter came on for hearing before the superior court of Pierce county on March 19, 1951. The trial court announced at the close of the hearing on that day that an order would be entered requiring the Faracos to surrender the child to the Wards by noon of the following day."
> 38 Wash 2d 433-434, 230 P2d 304.

While there was a procedural thicket including a writ of prohibition, motion for stay, appeal, and a misunderstanding of what orders had been signed, eventually the parents prevailed. In the course of its opinion, the Court noted that

> "There is no doubt that the trial court had jurisdiction, during the pendency of the *habeas corpus* proceeding, to make temporary provision for the custody of the child. This is specifically authorized by Rem.Rev.Stat. § 1083. State ex rel. Davenport v. Poindexter, supra; State ex rel. De Bit v. Mackintosh, 98 Wash. 438, 167 P. 1090." 38 Wash 2d 435-436, 230 P.2d 305.

The point to note here is that, even in the expedited procedure applicable then and now for a temporary order, there were five days from the petition to the temporary order---and that

was when there was (an apparently well-founded) concern that the opposing party (the parents) would flee the jurisdiction.

In the instant case the facts do not begin to support any such concern.

9. In this case also, the Mother's attorney obtained these extraordinary orders (the writ authorized law enforcement to---literally---break down the door to retrieve her from Father. Writ at 1: 24-26) with the 'notice' of a phone call, no prior delivery to Father or his counsel of the motion (which was supposed to be a petition) and the proffered orders until *after* the hearing. This was when both opposing counsel and the Court *knew* that Father was represented by counsel---and that he was unavailable at the time of the hearing. The Court was then presented with documents that the other side, represented by counsel, had never even seen.

Both Court and counsel were advised of this (via the 1:04 p.m. filing of 4-4-11; see declaration of Amy Rau). As noted above, this violated Father's rights to due process, CR 6(d), and the Kitsap county local rules. It is also not authorized by the habeas corpus statutes.

Astoundingly, the Court signed these documents anyway. That was clearly error. Revealingly, the motion from Mother that

requested these unprecedented, unwarranted, unauthorized and unconstitutional orders *did not cite a single statute for case for to support such a request.*

H. Case Remains Justiciable

1. While the child has, since the challenged orders, returned to Petitioner, the case is far from moot. The parties had---and continue to have---a substantial dispute about the obligation of Father to send their daughter across the country (especially when there is a layover and a connecting flight) unaccompanied. The parenting plan speaks of the flight be accompanied; it also requires cooperation of both parties in planning the trip. Both requirements were, at least arguably, ignored by Mother.

2. More importantly, the issues of the required notice and procedure remains unanswered: can one counsel give 3.3 hours 'notice' via a phone call, to opposing counsel for a hearing, without providing a copy of the motion filed with the Court until after the hearing? Does this comply with CR 6(d)? With Kitsap County Local Superior Court Rule 77(k)(10) (B)(ii))? With the Washington Constitution Due Process Clause? With the U.S. Constitution Due Process Clause? With the Washington habeas corpus statutes?

3. In *Spokane Research & Defense Fund v. City of Spokane*, 155 Wash 2d 89, 99, 117 P3d 1117, 1122 (2005), the Supreme Court held that even if attorney fees were the only issue remaining open for the Court to affect by its decision, the case is not moot but remains justiciable.

4. In *Federal Way School Dist. 210 v. Vinson*, 154 Wash App 220, 225 P3d 379 (2010), the Court had before it a school district that had terminated a teacher for alleged misconduct. A hearings officer had ruled that the teacher's conduct was not sufficient for termination. The school district brought a statutory (RCW 7.16.040) writ of review proceeding to challenge the hearings officer's ruling. The Superior Court upheld the hearings officer. The District appealed. The Court of Appeals explained:

> "This case was not moot when the trial court denied the writ. After the parties had submitted their briefing on appeal, Vinson withdrew his request for reinstatement, waived the award of attorney fees, and asked this court to dismiss the appeal as moot. However, Vinson has not stipulated that there was sufficient cause for his termination. Nor did the parties agree to vacate the entire action.
>
> The District argues that the case is not moot, because it is still bound by the hearing officer's determination that it lacked sufficient cause to terminate Vinson and because Vinson has filed a separate lawsuit for damages, relying upon the decision of the hearing officer as the basis for his wrongful termination claim. Vinson has admitted he filed such an action. The District argues that the 'prejudice suffered ... as a result of the [h]earing [o]fficer's erroneous

decision will continue, in the form of the District being required to defend an action based on that decision.'

'A case is moot if a court can no longer provide effective relief.'Orwick v. City of Seattle, 103 Wash.2d 249, 253, 692 P.2d 793 (1984). We agree with the District that the case is not moot; we are still in position to award relief to the District.12 The hearing officer's decision that the District lacked sufficient cause to discharge under Clarke was wrong as a matter of law. Vinson's waiver of reinstatement and award of attorney fees relieved the District of two immediate consequences of the hearing officer's erroneous decision, but not of the erroneous decision itself, or of any other collateral consequences that flow from it.

. . .

The District argues that even if the case is moot we should apply the doctrine of equitable vacatur to the hearing officer's decision to avoid any collateral consequences of the unreviewed decision, or we should reach the merits under the Westerman public interest exception.

Were we to accept Vinson's contention that the case is moot, we are persuaded this is an appropriate case to invoke the doctrine of equitable vacatur. A court may apply the doctrine of equitable vacatur where judgments have become moot but may nonetheless have preclusive effect. See Ctr. for Biological Diversity v. Lohn, 511 F.3d 960, 965 (9th Cir.2007) (vacating trial court's judgment in moot case " 'is commonly utilized ... to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences' ") (quoting United States v. Munsingwear, Inc., 340 U.S. 36, 41, 71 S.Ct. 104, 95 L.Ed. 36 (1950)). In Washington, a judgment in a case that has subsequently become moot may be preclusive if left of record. See Nielson, 135 Wash.2d at 263-64, 956 P.2d 312;cf. Sutton v. Hirvonen, 113 Wash.2d 1, 9-10, 775 P.2d 448 (1989) (vacatur necessarily eliminates preclusive effect of judgment). Under this doctrine, we would vacate the hearing officer's decision." 154 Wash App. 231-233, 225 P3d 386-387.

Like the Court in *Vinson*, this Court is in a position to afford effective relief---to prevent an order from "spawning any legal consequences.

The case is also analogous to *Vinson* in that "waiver of reinstatement and award of attorney fees relieved the District of two immediate consequences of the hearing officer's erroneous decision, but not of the erroneous decision itself, or of any other collateral consequences that flow from it."---and here Mother has not waived the award of attorney fees against Father; furthermore there remains "the erroneous decision itself" and "any other collateral consequences that flow from it."

5. Absent reversal by this Court on reconsideration, Father is 'on record' as having wrongfully retained the parties' child---to the extent that the Court found it necessary to authorize orders to break down his door if needed and immediately retrieve the child---orders issued less than 3 ½ hours after being requested---and with no meaningful opportunity for Father's counsel to appear, investigate, research, brief, or mount any type of defense. That implicit finding may well itself rear its head in any future parenting time disputes between the parents.

6. The Court's finding, if left un-reviewed, also sets Father up

for further similar actions by Mother in the future. She can effectively unilaterally decide what the transportation arrangements for the parties' daughter will be and inform Father, effectively making him comply with her decisions or be faced with an immediate 'hearing' contrary to constitutional requirements, court rules, and statutes---in effect a evanescent one-sided presentation to the decision-maker---like a hologram: an image without substance, an imitation of the real thing.

7. Mother would also be in a position to use the Father's alleged wrongdoing (implicitly found in the orders the Court issued) against him in future (a) motions for a writ of habeas corpus, (b) motions for order to show cause for contempt, or (c) motions to modify the parenting plan. There could also be other collateral civil (tort) actions for wrongful imprisonment or even a criminal action for custodial interference.

8. In *IBF, LLC v. Heuft*, 141 Wash App 624,174 P3d 95 (2007), the Court of Appeals reversed the trial court in issuing a writ of restitution (for commercial lease) in an unlawful detainer action. In ruling against the lessor's mootness claim on appeal, the Court explained that:

"First, IBF argues this case is moot because Heuft is not

> seeking possession. Heuft argues that because the commissioner ordered a money judgment and attorney fees against her, she still has a monetary stake in the action, and this case is not rendered moot.
> 'A case is technically moot if the court cannot provide the basic relief originally sought, or can no longer provide effective relief.'Josephinium Assocs. v. Kahli,111 Wash.App. 617, 622, 45 P.3d 627 (2002) (quoting Snohomish County v. State, 69 Wash.App. 655, 660, 850 P.2d 546 (1993)). But an unlawful detainer action is not moot simply because the tenant no longer has possession of the premises. Housing Auth. v. Pleasant, 126 Wash.App. 382, 388, 109 P.3d 422 (2005) (citing Lochridge v. Natsuhara, 114 Wash. 326, 330, 194 P. 974 (1921)). If the tenant does not concede the right of possession, she has the right to have the issue determined. Id. at 389, 109 P.3d 422.Further, if a tenant has a monetary stake in the outcome of the case, such as payment of rent and attorney fees, our Supreme Court has held that "[o]bviously, [such a] case is not moot." McGary v. Westlake Investors, 99 Wash.2d 280, 284, 661 P.2d 971 (1983). 141 Wash App 630-631,174 P3d 98-99.

9. Similarly the Court held, in *Emmerson v. Weilep*, 126 Wash App 930, 938, 110 P3d 214, 217 (2005), that appeal of a temporary protection order (which had expired) is not moot. Respondent had obtained a temporary (ex parte) anti-harassment protection order against Petitioner. At the hearing, the trial court denied extension of the temporary order (and also denied Petitioner's request for attorney fees). On appeal, Respondent (who eventually prevailed in the appeal) argued that the issue was moot (as the temporary protection order had expired since the trial court had declined to make it permanent). The Court of Appeals

(while not ruling expressly on the issue) implicitly denied that claim since it ruled on the merits and did not dismiss for mootness. Petitioner had pointed out that (a) he wanted to have the temporary protection order expunged from his record and (b) he should have been awarded attorney fees.

The situation is similar here: Father (a) seeks to have the writ of habeas corpus vacated (and thereby 'off of his record') and (b) reversal of the award of attorney fees since it was not justified given both the procedurally and substantively erroneous issuance of the writ.

The *Emmerson* Court also set forth a useful standard for deciding mootness: "An issue is moot if 'there is no longer a controversy between the parties, or if a substantial question no longer exists.'*Pentagram v. City of Seattle,*28 Wash.App. 219, 223, 622 P2d 892 (1981).'"

In the instant case, there certainly is a controversy between the parties and a substantial question exists---both as to procedure (grossly inadequate notice to Father's counsel and to Father) and as to the substantive decision (adult accompaniment on the flight).

10. Non-mootness was also addressed by the Court of Appeals in *Koenig, v. City Of Des Moines*, 123 Wash App 285, 95

P3d 777 (Div 1, 2005), rev on other grounds, 158 Wash.2d 173, 142 P.3d 162 (2006). There the father of a child sexual assault victim requested records of the city pertaining to the incident. The city refused. The father sued to obtain the release; the court sided with the father. The city appealed---"both the order releasing the redacted records, and the order awarding Koenig attorney fees. Koenig cross-appeals the trial court's denial of statutory penalties against the city. Furthermore, Koenig has moved to dismiss the city's appeal as moot." 123 Wash App 290, 95 P.3d 779.

The Court denied the motion to dismiss based on mootness, explaining that

> "A case is moot only when a court cannot provide meaningful relief.[1] This case is not moot because we can provide the city with meaningful relief from both of the errors it claims. First, a decision in the city's favor on the records disclosure issue would require that we reverse Koenig's attorney fee award. Second, a decision in the city's favor on the issue of attorney fee calculation would require that we remand the matter to the trial court.
> Consequently, the city's appeal is not moot and we deny Koenig's motion to dismiss." 123 Wash App 291, 95 P.3d 779.

Also in the instant case, Father is arguing that the process that resulted in the Court's orders was improper; that he complied with the court's order but did not 'voluntarily' put his daughter on an unaccompanied cross-country flight; he does not concede that

Mother had a right to insist on the unaccompanied flight (but indeed vigorously denies it); and that (because of the attorney fees and costs imposed on him) he still has a monetary stake in the eventual outcome of the Court's order.

I. Attorney Fees Should Not Have Been Awarded Against Father

This Alice in Wonderland scenario (a 'notice' that was essentially not a notice; a 'hearing' on a motion that one side prepared and showed to the judge *before* the hearing but not to the other side's attorney until *after* the hearing; local court rules, state civil procedure rules, and the Due Process Clause ignored) was exacerbated yet further when the Mother persuaded the Court---easy enough when Father's attorney was effectively kept out of the hearing---that Father (whose own attorney was effectively precluded from participating in the hearing) should pay Mother's attorney fees.

This Court should also reverse the award of attorney fees against Father---and impose attorney fees on Mother.

V. CONCLUSION

In part the conclusion can be found in the Trial Court's own ruling: even the Trial Judge conceded (in his ruling on Father's

Motion for Reconsideration) that "Mr. Wright is justified in taking issue with the minimal advance notice he received of Ms. Verhalen's habeas application. That Mr. Wright received scantly more than three hours to prepare for the hearing is questionable; that he received no advance copy of the motion documents is unacceptable." Order on Respondent's Motion for Reconsideration at 2: 3-6.

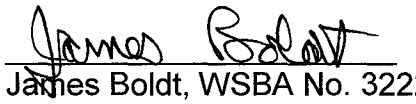
This case presents this Court with important questions that call for answers, in holdings that:

A. Father's right to adequate notice was violated---and so the Trial Court's holding should be reversed.

B. Father's right to have his attorney of record represent him at the hearing was effectively taken away in the circumstances of this case---and so the Trial Court's holding should be reversed.

C. The procedure employed by Mother and the Trial Court violated Kitsap County Local Court Rules, CR 7, and the Due Process Clauses of the U.S. and Washington and United States Constitutions---and so the Trial Court's holding should be reversed.

Dated this 12th day of October, 2011.



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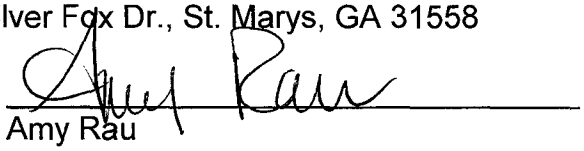
CERTIFICATE OF SERVICE

I certify that on the 12th day of October, 2011, I caused a true and correct copy of this Brief of Appellant to be served on the following via U.S. Priority Mail with Delivery Confirmation:

Sheila Verhalen, Petitioner (pro se)
167 Silver Fox Dr., St. Marys, GA 31558



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